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Nos. 86-622 and 86-737

Supreme Court, U.S.
FILED
MAY 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE TRAYNOR,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

JAMES P. MCKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second Circuit and the District of Columbia Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI IN 86-737 FILED NOVEMBER 5, 1986
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May 28, 1987

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No. 86-622

July 13, 1982	-	Complaint filed in the United States District Court for the Southern District of New York
October 18, 1982	-	Defendants' Answer filed
April 2, 1984	-	Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment filed
April 4, 1984	-	Plaintiff's Cross-Motion for Summary and Declaratory Judgment filed
April 4, 1985	-	District Court opinion filed granting Plaintiff's Motion for Summary and Declaratory Judgment
June 6, 1985	-	Judgment of District Court for plaintiff entered
August 1, 1985	-	Notice of Appeal filed

May 16, 1986	-	Judgment of United States Court of Appeals for the Second Circuit reversing the judgment of the District Court entered
July 15, 1986	-	Order denying Petition for Rehearing and Suggestion for Rehearing En Banc filed
October 14, 1986	-	Petition for Certiorari filed
March 9, 1987	-	Certiorari granted

Chronological List of
Relevant Docket Entries

No. 86-737

July 20, 1983	-	Complaint filed in the United States District Court for the District of Columbia
September 27, 1983	-	Defendant's motion to dismiss or, in the alternative, for summary judgment filed
October 26, 1983	-	Plaintiff's cross-motion for summary judgment and memorandum in support thereof filed
October 19, 1984	-	Memorandum Opinion and Order of District Court filed, granting plaintiff's motion for summary judgment in part and invali-

		dating 38 C.F.R. § 3.301(c)(2) as discriminatory in violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and remanding the case to the VA for determination of whether plaintiff is entitled to benefits
December 13, 1984	-	Notice of Appeal filed
May 30, 1986	-	Judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the judgment of the District Court entered
August 7, 1986	-	Per curiam order denying appellee's petition for rehearing.

August 7, 1986	-	Per curiam order, en banc, denying appellee's suggestin for rehearing en banc.
Nov. 5, 1986	-	Petition for Certiorari filed
March 9, 1987	-	Certiorari granted

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EUGENE TRAYNOR,	:	
Plaintiff,	:	COMPLAINT
- against -	:	Civil Action No. 82 Civ.
ROBERT P. NIMMO, Administrator of the Veterans' Administration; and the VETERANS' ADMINISTRATION,	:	4563 (Cooper)
Defendants.	:	

PRELIMINARY STATEMENT

1. This action is brought on behalf of an honorably discharged veteran who has been denied the veterans' educational assistance benefits to which he is entitled solely on the basis of a history of alcoholism, a disease from which he is now recovered.

2. Plaintiff's honorable tour of active duty in the armed services entitled him to veterans' educational assistance

benefits; he was unable to use these benefits to pursue his education for several years following his discharge because he was suffering from alcoholism. Following his recovery, he requested an extension of time in which to use his entitlement to benefits pursuant to Veterans' Benefits Law §1662(a). Section 1662(a) requires that extensions of time be granted to any veteran who, because of a disability that was not the result of his own willful misconduct, was prevented form pursuing his education during the time that veterans are normally allotted for using educational assistance benefits. Defendants have denied plaintiff an extension of time solely on the basis of a Veterans' Administration regulation that conclusively defines alcoholism as resulting from "willful misconduct."

3. Plaintiff challenges the regulation defendants applied to deny him the

extension of time to use the education benefits to which he was entitled on the grounds that:

A. It discriminates against veterans who are entitled to educational assistance benefits solely on the basis of their handicap of alcoholism, in violation of section 504 of the Rehabilitation Act of 1973 as amended in 1978, 29 U.S.C. §794;

B. By refusing to recognize alcoholism as a disability and conclusively defining it as resulting from willful misconduct, thus denying veterans with a history of alcoholism the benefits to which they are entitled under 38 U.S.C. §1662(a), it discriminates against a particular class of persons without rational justification in violation of the Fifth Amendment to the Constitution of the United States;

C. It was promulgated and is applied by defendants in excess of their statutory authority, without rational basis, and without observance of the procedures required by law, in violation of 38 U.S.C. §§105, 210(c)(1) and 1662(a) and 5 U.S.C. §§553, 701-706.

JURISDICTION

3. This is a civil action brought under 29 U.S.C. §794, which provides that no otherwise qualified handicapped individual shall, by reason of his handicap, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by any Executive Agency; and under the Fifth Amendment to the Constitution of the United States. This action is also brought under 38 U.S.C. §§210(c)(1),

1662(a) and 5 U.S.C. §§553, 701-706, in that it challenges defendants' regulation concerning alcoholism as being promulgated without observance of the procedures required by law, without rational basis and in excess of defendants' statutory authority to administer the Veterans' Benefits Law. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1331, 28 U.S.C. §1361, 28 U.S.C. §§2201 and 2202, and 29 U.S.C. §794(a)(2).

PARTIES

4. Plaintiff Eugene Traynor is an honorably discharged veteran who resides in New York State.

5. Defendant Veterans' Administration (VA) is that part of the executive branch responsible for administering the laws relating to veterans' benefits. 38

U.S.C. §201. The VA regional office which denied plaintiff's application for benefits is located in New York City.

6. Defendant Robert P. Nimmo is the Administrator of the VA and is sued in his official capacity. As Administrator, he is in charge of the VA, and is responsible for executing the laws relating to veterans' benefits and for promulgating regulations which are consistent therewith. 38 U.S.C. §210.

STATEMENT OF THE FACTS

7. Plaintiff received an honorable discharge from the armed services after serving on active duty from February 27, 1968 through August 27, 1969.

8. By virtue of his honorable tour of active duty, plaintiff became entitled to veterans' educational assistance

benefits under Chapter 34 of the Veterans' Benefits Law, 38 U.S.C. §1651, et seq.

9. From some time prior to his discharge through February 1974, plaintiff suffered from the disease of chronic alcoholism. As a result he drank compulsively and was ill every day, suffered from frequent internal bleeding (resulting in hematemesis), convulsive seizures, loss of consciousness and other disabling symptoms of alcoholism. During this period plaintiff was unable to hold a job for more than a few days, and was hospitalized five times for treatment of the convulsions, hematemesis, and other deleterious signs of alcoholism. He was initially diagnosed as suffering from alcoholism in 1970, and this diagnosis was reconfirmed each time he was hospitalized through 1974.

10. In February 1974 plaintiff joined Alcoholics Anonymous, stopped

drinking, and began recovering from alcoholism. By January 1976 he was able to obtain full-time employment. He has been steadily employed on a full-time basis since that time.

11. During the time plaintiff was suffering and recovering from chronic alcoholism, he was unable to initiate or pursue his college education.

12. By 1978, plaintiff had sufficiently recovered from alcoholism to be able to pursue his education. In the spring of 1978 he was admitted to City College of the City University of New York, and began taking courses at night while he continued to work full-time.

13. When plaintiff began attending college, he applied for and was determined to be entitled to veterans' educational assistance benefits.

14. Plaintiff received veterans' educational assistance for the first four

semesters that he attended college (the 1978 spring, summer and fall terms, and 1979 spring term).

15. In 1979, the VA notified plaintiff that his educational assistance benefits would be terminated as of August 27, 1979, ten years after the date he was discharged from active duty (his "delimiting date").

16. The Veterans' Benefits Law, 38 U.S.C. §1662(a), provides in pertinent part:

> (a)(1) No education assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty...except that, in the case of any veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application...be granted an extension of the applicable

> delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was so prevented from initiating or completing such program of education.

17. The Veterans' Benefits Law defines "disability" for purposes of determining claims for veterans benefits as meaning "a disease, injury, or other physical or mental defect." 38 U.S.C. §601(1).

18. Alcoholism is a disability under the meaning of 38 U.S.C. §601(1) and 38 U.S.C. §1662(a).

19. Although the Veterans' Benefits Law nowhere defines what constitutes "willful misconduct," VA regulation §3.1(n) defines that term as follows:

> (n) "Willful misconduct" means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Veterans

> Administration unless it is patently inconsistent with the facts and the requirements of laws administered by the Veterans Administration.
>
> (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.
>
> (2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.
>
> (3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death. (See §§3.301, 3.302.)

38 C.F.R. §3.1(n).

20. In May 1979 plaintiff applied for an extension of his delimiting date pursuant to 38 U.S.C. §1662(a) on the ground that his former condition of alcoholism was a disability that had prevented him from initiating or completing his education during his delimiting period. In support of this application, he submitted medical evidence that documented his history of alcoholism during the period for which he sought an

extension of time for receiving educational assistance benefits.

21. By letter dated August 21, 1979, the New York City Regional Office of the VA informed plaintiff that it had denied his application.

22. The sole basis for this decision was VA regulation §3.301(c)(2), which conclusively presumes alcoholism to be the result of "willful misconduct."

23. VA regulation §3.301(c)(2) provides that the general definition of "willful misconduct" set forth in ¶19, supra shall not apply in determining claims for certain veterans' benefits where alcoholism is concerned. Instead, it provides that the following rule shall govern such determinations:

> (2) Alcoholism. The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption

> to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

38 C.F.R. §3.301(c)(2).

24. Although plaintiff had been hospitalized several times during the period for which he sought an extension of his delimiting date for treatment of secondary organic disorders caused by his chronic alcoholism, as set forth in ¶9, supra, the VA refused to grant him any extension of time for even those periods of hospitalization because of another VA regulation, 38 C.F.R. §21.1043(a), which provides that a veteran disabled for periods of 30 days or less will not be

considered to have been prevented from pursuing his education given the short duration of his disability. In applying VA regulation 21.1043(a), defendants refused to recognize alcoholism itself as a disability.

25. The VA terminated plaintiff's educational assistance benefits as of August 27, 1979. At that time, plaintiff had approximately fourteen and one-half months of educational assistance benefits remaining in his original entitlement.

26. Plaintiff appealed the initial decision denying him an extension of his delimiting date to the VA's Board of Veterans' Appeals in Washington, D.C. At a hearing held on August 1, 1980 plaintiff submitted additional evidence to the Board of Veterans' Appeals showing that alcoholism is recognized as a chronic

disease by the American Medical Association, the American Psychiatric Association and federal agencies, including the VA itself in its hospitals and rehabilitation programs, that persons afflicted with the disease drink compulsively and without control, and that such drinking and the consequent disabling effects are not the result of willful conduct.

27. On December 17, 1980 the Board of Veterans' Appeals denied plaintiff's appeal on the basis of VA regulation §3.301(c)(2).

28. Plaintiff sought reconsideration of this decision. On November 17, 1981 the Board of Veterans' Appeals issued its opinion on reconsideration, affirming its previous decision on the basis of VA regulation §3.301(c)(2). In this opinion, the Board refused to consider plaintiff's claims that regulation §3.301(c)(2)

violated the Fifth Amendment, the Rehabilitation Act, and the Veterans' Benefits Law, on the ground that 38 U.S.C §4004(c) limited the Board's jurisdiction and bound the Board to act in accordance with VA regulations and Veterans' Administrator's Decisions.

29. Since September 1979 plaintiff has continued to attend college at his own expense.

30. Defendants are required by 38 U.S.C. §210(c)(1) and by 5 U.S.C. §§553 and 701-706 to adopt regulations which do not exceed their statutory authority, and which are rationally related to statutory objectives. They are also required by 5 U.S.C. §553 and 38 C.F.R. §1.12 to promulgate regulations pursuant to the procedures set forth in the Administrative Procedure Act, 5 U.S.C. §551 et seq. Defendants have failed to fulfill these obligations.

31. The VA originally defined alcoholism as willful misconduct for purposes of determining claims for certain benefits under the Veterans' Benefits Law during Prohibition when the sale of alcohol was illegal (Veterans' Regulation No. 10 and Veterans' Administrator's Decision No. 2); it subsequently incorporated that definition of alcoholism in Veterans' Administrator's Decision No. 988, which was issued in 1964.

32. On information and belief, the definition of alcoholism as willful misconduct contained in Veterans' Administrator's Decisions Nos. 2 and 988 provided the sole basis for VA regulation §3.301 (c)(2) when defendants promulgated that regulation in 1972. On information and belief, regulation §3.301(c)(2) was not based on any studies or medical evidence regarding the nature of alcoholism.

33. VA regulation §3.301(c)(2) was promulgated in 1972 pursuant to Chapters 11 and 15 of the Veterans' Benefits Law, 38 U.S.C. §§310 and 521, which pertain to benefits for service-connected disabilities (known as "compensation") and to benefits for non-service-connected disabilities (known as "pension"). These chapters provide benefits for a disability from which a veteran has not recovered, provided that the disability was not the result of the veteran's own willful misconduct.

34. VA regulation §3.301(c)(2) and the Veterans' Administrator's Decisions on which it is based were not promulgated pursuant to Chapter 34 of the Veterans' Benefits Law, 38 U.S.C. §1651 et seq., which pertains to educational assistance benefits. Defendants have nevertheless applied this regulation to applications for educational assistance benefits

without having published notice in the Federal Register and without having received comments or considered whether it is appropriate to use a definition developed for different benefit programs during Prohibition.

35. In 1970 the Congress of the United States recognized that: "Alcoholism is an illness requiring treatment...." 42 U.S.C. §4541(a)(8) (Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970).

36. The Congress has further provided that persons with a history of alcoholism are "handicapped" individuals entitled to the protections of the Rehabilitation Act of 1973 as amended in 1978, 29 U.S.C. §706(7).

37. Defendant VA is an agency within the executive branch of the federal government, 38 U.S.C. §201, and as such

is required to comply with section 504 of the Rehabilitation Act, 29 U.S.C. §794, which provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity...conducted by any Executive Agency....

38. By virtue of his history of alcoholism, plaintiff is a handicapped individual within the meaning of section 706(7) of the Rehabilitation Act. Having demonstrated that his disability of alcoholism prevented him from being able to pursue his education during his original delimiting period, he is entitled to an extension of his delimiting date pursuant to 38 U.S.C. §1662(a).

39. Section 504 of the Rehabilitation Act of 1973 as amended in 1978 also provides that the head of each Executive

Agency "shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation...Act of 1978." The VA has failed to review its existing regulations and promulgate regulations which carry out its obligations under the Rehabilitation Act as amended in 1978.

VIOLATIONS OF LAW

40. VA regulation §3.301(c)(2):

A. Discriminates against qualified veterans in a federal benefit program on the basis of their handicap of alcoholism in violation of section 504 of the Rehabilitation Act, and is maintained and enforced in violation of defendants' duty to promulgate regulations to carry out the purposes of the Rehabilitation Act of 1973 as amended in 1978;

B. Was promulgated and is maintained and applied by defendants in excess of their statutory authority, without rational basis, and without observance of the procedures required by law, in violation of 38 U.S.C. §§105, 210(c)(1), 1662(a), and 5 U.S.C. §§553, 701-706 and 38 C.F.R. §1.12;

C. Creates an irrebuttable presumption and discriminates against a class of persons with a history of alcoholism without rational basis in violation of the Fifth Amendment to the Constitution of the United States.

41. By applying VA regulation §3.301(c)(2) to deny plaintiff any extension of his delimiting date for receipt of educational assistance benefits, defendants have:

A. Discriminated against a qualified handicapped individual in

violation of section 504 of the Rehabilitation Act of 1973 as amended in 1978;

B. Denied plaintiff benefits to which he was entitled by virtue of having been a disabled individual, in violation of the Veterans' Benefits Law, 38 U.S.C. §§105 and 1662(a); and

C. Discriminated against a handicapped individual in violation of the Fifth Amendment to the Constitution of the United States.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that the court:

A. Declare, pursuant to 28 U.S.C. §2201, that defendants' regulation 38 C.F.R. §3.301(c)(2) and the Veterans' Administrator's Decisions Nos. 2 and 988 on which it is based are in violation of

the Rehabilitation Act of 1973 as amended in 1978, the Veterans' Benefits Law, the Administrative Procedure Act, and the Fifth Amendment to the Constitution and are therefore null and void;

B. Grant plaintiff's application for an extension of his delimiting date or, in the alternative, remand this case to the VA with a direction that defendants reconsider plaintiff's application without regard to VA regulation §3.301(c)(2) and Veterans' Administrator's Decisions Nos. 2 and 988;

C. Issue a permanent injunction pursuant to 28 U.S.C. §§1361 and 2202, requiring defendants, their agents, employees and successors to refrain from using or promulgating any regulation or Veterans' Administrator's Decision which is inconsistent with section 504 of the Rehabilitation Act of 1973 as amended in 1978, the Veterans' Benefits Law, 38

U.S.C. §§105, 1662(a), and the Fifth Amendment to the Constitution of the United States;

D. Issue a permanent injunction, pursuant to 28 U.S.C. §§1361, 2202, and 29 U.S.C. §794(a)(2), requiring defendants to promulgate regulations as required by section 504 of the Rehabilitation Act of 1978 and to do so pursuant to the procedures required by the Administrative Procedure Act and 38 C.F.R. §1.12.;

E. Award plaintiff costs, including disbursements, and reasonable attorneys' fees; and

F. Grant such other and further relief as may be appropriate.

Dated: New York New York
July 13, 1982

Respectfully submitted,

/s/ Ellen V. Weissman
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EUGENE TRAYNOR,	:	
Plaintiff,	:	
- against -	:	Civil Action No.
HARRY N. WALTERS, Administrator of the Veterans Administration; and the VETERANS ADMINISTRATION,	:	82 Civ. 4583 (I.B.C.)
	:	AFFIDAVIT OF
Defendants.	:	ANNE GELLER, M.D.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ANNE GELLER, being duly sworn, deposes and says:

1. I am a physician, and am currently the Director of the Smithers Alcoholism Treatment and Training Center, a comprehensive alcoholism treatment and rehabilitation facility in St. Luke's/ Roosevelt Hospital Center, New York, New York. I am also a professor of Clinical

Social Medicine at Columbia College of Physicians and Surgeons, New York, New York.

2. My medical education and training, professional experience, and published works are described in detail in my resume, a copy of which is attached as Appendix A to this affidavit. I received a bachelor's degree in medicine and a master's degree in physiology from Oxford University (Oxford, England). I earned my medical degree in 1960 from University College Hospital (London, England). Between 1960 and 1966, I completed residencies in psychiatry and neurology at New York University, Bellevue Hospital (New York, New York). Between 1966 and 1973, I served as a post-graduate fellow and professor of pharmacology at Albert Einstein College of Medicine (New York, New York). During this time I performed psychopharmacological research

and teaching, specializing in the effects of alcohol on the brain. Between 1974 and 1977, I was employed as a consultant on alcoholism and drug addition, and then as Chief Medical Consultant for the Federal Bureau of Disability, a branch of the United States Social Security Administration; my duties there included reviewing SSI disability cases involving alcoholism and addiction. Since 1977 I have been employed by the Smithers Alcoholism Treatment and Training Center ("Smithers"), serving as Coordinator of Treatment until 1979, and as Director of the program since then. In all, I have worked for eighteen years, performing both research and clinical work, in the field of alcoholism.

3. My memberships in medical and other organizations concerned with alcoholism treatment and rehabilitation are described in my resume. Among other

activities, I currently serve as Chairperson of the New York Chapter of the American Medical Society on Alcoholism, and as Chairperson of the Impaired Physicians Committee of the New York State Medical Society. I am also a member of the respective alcoholism committees of the New York State Medical Society and New York Academy of Medicine.

4. During the seven years in which I have been Coordinator of Treatment and then Director of Smithers, I have been involved in and responsible for the clinical treatment of thousands of persons with alcoholism. Smithers receives from 1000 to 1500 patients a year; I personally see about half of the patients and am responsible for organizing the clinical treatment of all patients.

5. I have published a number of articles concerning alcoholism research and treatment. Among them have been

articles on the psychopharmacology of alcoholism (including articles about the effects of alcohol on behavior and about disturbances in the brain that occur as a consequence of alcoholic drinking); on alcohol and anxiety; and on various aspects of alcoholism treatment and rehabilitation.

6. During the course of my professional career I have read and become thoroughly familiar with the available literature and studies relating to alcoholism; and with the official policies of national and international medical and professional health organizations concerning alcoholism and its treatment. I have also worked with or otherwise become familiar with the work and professional opinions of many if not most medical professionals specializing in the field of alcoholism research or treatment.

7. It is and has for many years been the consensus of the medical profession that alcoholism is a disease.

8. The American Medical Association ("AMA") first described and recognized alcoholism as an illness that requires and is appropriate for medical treatment in 1956. In its 1967 Manual on Alcoholism, the AMA defined alcoholism as follows:

> Alcoholism is an illness characterized by preoccupation with alcohol and loss of control over its consumption such as to lead usually to intoxication if drinking is begun; by chronicity; by progression; and by tendency toward relapse. It is typically associated with physical disability and impaired emotional, occupational, and/or social adjustments as a direct consequence of persistent and excessive use.
>
> * * * *
>
> As the illness progresses, the alcoholic's preoccupation with alcohol leads

> him to organize and orient his life around drinking. . . . Consumption of very substantial amounts of alcohol, however, and frequent intoxication *per se* are *not necessarily equated* with alcoholism, even though these signs usually are prominent in the course of the illness. It *can* happen that some alcoholics actually consume less liquor over a given length of time than do some social drinkers, but this fact in itself does not alter the basic condition nor make it less serious. *The key factor is in control*.

American Medical Association, *Manual on Alcoholism* (Chicago, 1957) at 6. [Emphasis supplied.]

9. The American Psychiatric Association ("APA") has also recognized alcoholism as a diagnosable and treatable illness for many years. It has classified alcoholism as a distinct mental disorder in every edition of its *Diagnostic and Statistical Manual of Mental*

Disorders ("DSM") since that comprehensive manual classifying, defining and setting forth criteria for diagnosing such disorders was first published by the APA in 1952. The APA's diagnostic criteria for alcoholism, as set forth in the current edition of this manual (DSM-III, published in 1980), are reproduced in Appendix B of this affidavit. These diagnostic criteria, with which I am in general agreement, are commonly accepted and widely used by the medical profession in diagnosing alcoholism.

10. The World Health Organization (WHO) has also officially recognized alcoholism as a distinct disease since 1951. This is reflected in its current edition of the International Classification of Diseases, Ninth Edition (ICD-9) (WHO, 1977) (No. 303, alcohol dependence syndrome).

11. The etiology (cause or causes) of alcoholism is not yet fully known. However, it is clear that the act of drinking does not itself make an individual alcoholic; of all people who drink, only 8 to 10 percent become alcoholic. Why those persons develop the disease, and what the etiology of alcoholism is, has been the subject of a great deal of research during the past twenty years. This research has shown that there are certain factors that predispose certain individuals to developing alcoholism, that make them vulnerable to developing this disease.

12. Out of that research has emerged strong evidence (consistent with my own work and clinical experience) that there is an extremely important genetic component to alcoholism. That is, there is an inheritable and inherited predisposition to developing alcoholism. Among

other studies documenting the genetic basis of this disease are recent studies of adopted children and twins in Scandinavia, whose purpose was in part to isolate environmental from genetic factors relating to alcoholism. The adoptee studies concerned children of alcoholic families who were adopted away from their biological parents at birth. They showed that, while the incidence of alcoholism among the general population of males in Scandinavia is approximately 7%, the incidence of the disease among adoptees with one alcoholic biological parent rose to 25%; and, if both biological parents were alcoholic, then the incidence of alcoholism in their adopted-away offspring rose to 50%.

13. There is a great deal of research now being done on children of alcoholics to determine precisely what it is in their genetic inheritance that

predisposes them to developing alcoholism. Although the answer is not yet clear, there is evidence that there are physical abnormalities in the way they metabolize alcohol. There also appear to be differences in the responses of children of alcoholics to alcohol, both physiological and psychological; these are still being investigated. This data suggests that the inherited predisposition of at-risk children of alcoholics is biochemical in nature.

14. Environmental and sociocultural factors also play a role in the development of alcoholism, just as they do in other diseases that are believed to have multiple causes, such as diabetes, schizophrenia and hypertension. Persons who live in social groups or societies where drinking is accepted, where drinking practices feature heavy, regular drinking or drinking-to-drunkenness,

become more vulnerable to developing alcoholism than those who live in societies where moderate or no drinking is the norm. For example, there is a lot of drinking and relief drinking in the Armed Services; such an environment will encourage the development of alcoholism in those predisposed to it.

15. Though the causes of alcoholism are not yet fully understood, the nature and course of the illness are well known. Alcoholism is a complex and progressive illness of insidious onset which typically develops over the course of many years. No one chooses to become an alcoholic; nor does anyone make a conscious decision to begin drinking alcoholically. Persons who do become alcoholic may begin drinking for the same reasons as those who are, and are able to remain, social drinkers: because alcohol is available and drinking socially

acceptable and enjoyable. However, individuals who develop alcoholism become increasingly dependent, psychologically and often physically, upon alcohol. As the disease progresses, alcohol becomes more and more essential for the alcoholic to function adequately. It becomes so central and important a part of life that the alcoholic cannot conceive of doing anything without a drink. The alcoholic drinker does not drink for enjoyment, but to medicate himself: to alleviate anxiety and tension (for alcohol is a sedative) and, where physical dependency upon alcohol develops (as discussed below), to forfend the pain of withdrawal.

16. The alcoholic's increasing dependency upon the drug is not something over which he has conscious control. Indeed, as the individual becomes progressively more dependent upon alcohol, the phenomenon of denial sets in. Denial is

an unconscious mental mechanism (unlike lying) by which an individual protects himself from recognizing his increasing need for alcohol and from being aware of the often-devastating consequences of its use. Denial is a primitive defense mechanism that all people have and may regress to in order to safegaurd themselves against the recognition of something which is threatening to their well-being. It is the ostrich syndrome: I don't see it; therefore it is not there. Denial is a common phenomenon in childhood; it is also a defense mechanism that adults often regress to when faced with catastrophe, illness or other life-threatening circumstances. Denial is a universal characteristic of alcoholism, and is inevitably present in the alcoholic. Indeed, as the illness progresses and the alcoholic's dependency upon alcohol increases, the denial itself

also progresses. The greater his need for alcohol, the greater becomes the alcoholic's denial of that need and the consequences of his drinking. Denial thus permits the alcoholic to persist in drinking, to satisfy his compelling need for alcohol, even in the face of the most extremely adverse consequences to his health and social and occupational functioning. It is this combination of gradually increasing dependency and denial that makes alcoholism so insidious an illness: the alcoholic simply does not and cannot let himself recognize what is happening to him. (And this defines a major purpose and focus of alcoholism treatment and rehabilitation: to break down the unconscious defense mechanism of denial, so as to enable the alcoholic to admit, and then learn to deal with, his dependency.)

17. Many (though not all) alcoholic drinkers develop physiological as well as psychological dependency upon the drug alcohol; this is characterized by tolerance (the need for ever greater amounts of alcohol in order to achieve the sought-for-effect) and withdrawal upon discontinuance of the drug (whose symptoms include anxiety, nausea, irritability, and possibly delirium tremors and seizures). There is a particular mechanism in the brain that responds to certain kinds of substances, of which alcohol is one, whereby the brain becomes adapted to the presence of the drug. As a consequence of this, the individual, in order to have the same effect from the drug, needs to have more and more of it. As this tolerance increases the addiction of the brain increases. When the use of alcohol is abruptly discontinued, one is left with a brain that is adapted to

alcohol, with nothing there for it to adapt to. The result is withdrawal, which is not only physically (as well as psychologically) painful but can be life-threatening. Thus, in persons who develop physiological dependence upon alcohol -- and those with daily drinking patterns will inevitably become physically dependent over time -- the use of alcohol becomes a matter of pure physical necessity: a certain level of alcohol must be maintained in the system in order to stave off withdrawal.

18. The salient characteristic of the alcoholic drinker is his loss of control over his drinking behavior. In contrast to the social drinker, once alcohol is in his system, the alcoholic's ability not to pick up another drink is lost; it is not something over which he has conscious or voluntary control. Thus alcoholics may, and many do, resolutely

and repeatedly promise themselves not to drink, to have only one drink, to stop drinking -- but repeatedly fail to do so. They cannot control their drinking not because they are irresolute or morally weak, but because they are alcoholic. This inability to alter or modify one's drinking pattern or to control intake once begun is a unique feature of alcoholic drinking, and not a part of social drinking at all.

19. In the majority of cases, alcoholism is a primary condition. That is, it is not the secondary result or manifestation of some other preexisting or underlying psychiatric disorder. However, many alcoholics present systems of depression and anxiety; these are common biochemically-induced psychiatric consequences of alcoholism, occurring as the result of alcohol's effect on neurotransmitters in the brain. (Thus,

detoxification and abstinence from alcohol will often be accompanied by the gradual decrease or disappearance of depression and anxiety in recovering alcoholics.) In some individuals, though, alcoholism is antedated by or associated with other distinct psychiatric disorder(s); and a dual diagnosis of alcoholism and other disorder(s) is appropriate.

20. In my seven years of clinical work at Smithers, in the preceding four years when I served as a consultant for the Social Security Administration reviewing SSI disability cases involving alcoholism, and as a result of my other professional experience in this field, I have had the opportunity to review the medical records and cases of thousands of persons diagnosed as having alcoholism. That experience confirms that the kind of diagnosis that is made

in the case of a particular individual -- whether the sole diagnosis is alcoholism, or whether a second diagnosis of a separate psychiatric disorder is also made -- is to a considerable degree fortuitous. That is, the nature of the diagnosis is likely to depend upon the nature of the facility where the individual is treated and the diagnosis is made, and upon the orientation -- medical or psychiatric -- of that particular facility. For example, alcohol detoxification units of hospitals or other medical facilities are likely to treat alcoholism as solely a medical condition, and persons treated in such facilities are apt to be given a diagnosis of primary alcoholism only. (Elmhurst Hospital, where I understand Eugene Traynor was treated, is one such facility.) Psychiatric facilities are more likely to consider and therefore to make second

diagnoses of psychiatric disorders in addition to alcoholism. In addition, because biochemically-induced depression and anxiety so often accompany alcoholism, the business of making accurate differential diagnosis becomes all the more difficult. This is not to say that accurate differential diagnoses cannot be or are never made in cases of alcoholism; but it is to say that chance does play a role in the diagnostic process in many individual alcoholics' cases.

21. In sum, alcoholism is a complex, chronic illness with both physiological and psychological components whose hallmarks are dependency, denial and the loss of control over one's drinking patterns and use of alcohol. It is, however, also an illness from which recovery is possible, as the many recovering and recovered alcoholics who have learned to accept and deal with their

illness, and been restored to health and normal functioning, can confirm.

22. I have personal knowledge of the facts stated herein.

/S/
ANNE GELLER, M.D.

Sworn to before me this
25 day of March, 1984.

/S/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EUGENE TRAYNOR, Plaintiff, - against - HARRY N. WALTERS, Administrator of the Veterans Administration; and the VETERANS Administration, Defendants.	CA No. 82 4563 (I.B.C.) AFFIDAVIT OF SHELDON ZIMBERG, M.D.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SHELDON ZIMBERG, being duly sworn, deposes and says:

1. I am a physician, and am currently the Director of Psychiatry at the Joint Diseases, North General Hospital (New York, New York). I am also an Associate Professor of Psychiatry at

Mount Sinai School of Medicine (New York, New York).

2. My medical education and training, professional experience, and published works are described in detail in my curriculum vitae, a copy of which is attached as Appendix A to this affidavit. I received a bachelor's degree from Brooklyn College (Brooklyn, New York) in 1957, and earned my medical degree from the State University of New York, Downstate Medical Center in 1961. From 1961 to 1962 I served as a medical intern at the Jewish Hospital of Brooklyn (Brooklyn, New York) and from 1962 to 1965 I completed a residency in psychiatry at Columbia Presbyterian Medical Center (New York, New York) and the New York State Psychiatric Institute (New York, New York). Between 1963 and 1966 I held a fellowship in community psychiatry at the Columbia University School of

Public Health and Administrative Medicine, and in 1966 I receive a masters degree in Community Psychiatry from that school.

3. Since 1965 I have been engaged in the private practice of psychiatry. In addition, from 1966 to 1970 I was an Instructor in Psychiatry at Columbia University, College of Physicians and Surgeons (New York, New York). From 1966 to 1969 I was chief of the Division of Community Psychiatry at Harlem Hospital (New York, New York). From 1967 to 1970 I was director of the Harlem Hospital Center Alcoholism Unit. Between 1970 and 1973 I was an Associate in Psychiatry at the Columbia University College of Physicians and Surgeons. From 1969 to 1973 I was Deputy Director of the Rockland County Community Mental Health Center (Pomona, New York). I was the Project Director of the Alcoholism

Treatment Center at the Joint Diseases, North General Hospital from 1973 to 1977. I was an Assistant Clinical Professor of Psychiatry at Columbia University College of Physicians and Surgeons from 1973 to 1974, and an Assistant Clinical Professor of Psychiatry at Mount Sinai School of Medicine from 1974 to 1977. I was Acting Director of the Department of Psychiatry at the Joint Diseases, North General Hospital from 1975 to 1977, and have been Director since 1977. Since 1977 I have also been an Associate Professor of Psychiatry at the Mount Sinai School of Medicine.

4. My memberships in medical and other organizations concerned with alcoholism treatment and rehabilitation are described in my curriculum vitae. Among other activities, I have served as Chairman of the Committee on Alcoholism and Drug Abuse of the New York County

District Branch of the American Psychiatric Association, Chairman of the Committee on Treatment of Alcoholism of the New York State Alcoholism Planning Task Force, and Chairman of the Committee on Inpatient Alcoholism Detoxification Criteria of the New York County Health Services Review Organization.

5. During the 19 years in which I have been practicing psychiatry, I have been involved in and responsible for the clinical treatment of hundreds of alcoholics. In addition, I have supervised the treatment of thousands of others. This clinical experience has been obtained in private psychiatric practice, in an urban general hospital center alcoholism treatment program, and in a suburban community mental health center alcoholism treatment program.

6. I have published a number of articles on the causes of and treatment for alcoholism. My publications and

presentations are listed in the attached curriculum vitae. I have also written a book, entitled The Clinical Management of Alcoholism (New York: Brunner/Mazel, 1982), which discusses these issues.

7. During the course of my professional career I have read and become thoroughly familiar with the available literature and studies relating to alcoholism; and with the official policies of national and international medical and professional health organizations concerning alcoholism and its treatment. I have also worked with or otherwise become familiar with the work and professional opinions of many if not most medical professionals specializing in the field of alcoholism research and treatment.

8. It is and has for many years been the consensus of the medical profession that alcoholism is a disease. This fact was recognized by the American

Medical Association in 1956. The World Health Organization has also, since 1951, officially recognized alcoholism as a distinct disease.

9. The American Psychiatric Association has also recognized alcoholism as a diagnosable and treatable illness for many years. It has classified alcoholism as a distinct mental disorder in every edition of its Diagnostic and Statistical Manual of Mental Disorders ("DSM") since that comprehensive manual classifying, defining and setting forth criteria for diagnosing such disorders was first published by the APA in 1952. I served on the advisory committee for Substance Abuse Disorders which helped prepare the definition of and diagnostic criteria for alcoholism, which appear in the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders

(DSM-III, published in 1980). These diagnostic criteria are commonly accepted and widely used by the medical profession in diagnosing alcoholism.

10. There are about nine to ten million alcoholics in the United States. However, it is clear that the simple act of drinking -- even to excess -- does not itself make an individual an alcoholic. Of all people who drink, only about five percent become alcoholic. There has been a great deal of research directed toward determining the cause or causes of alcoholism. This research has turned up evidence that individuals with a family history of alcoholism, including parents, siblings, grandparents, uncles and aunts, are at greater risk of developing the disease. A number of studies have shown this correlation to be due, at least in large part, to a genetic predisposition to alcoholism. In 1970, G. Winokur and

associates performed a family study in St. Louis on 259 hospitalized alcoholics from both a state and a private hospital. They interviewed first-degree relatives (parents, children, siblings) of the alcoholic individuals and found that about 50 percent of the male first-degree relatives were alcoholic. (Winokur, G., Reich, T. Rimmer, J. et al., "Alcoholism: Its Diagnosis and Familiar Psychiatric Illness," in 259 Alcoholic Probands. Arch. Gen. Psychiat., 1970, 23:104 - 111.) M.S. Schuckit developed a half-sibling study, which allowed comparisons of children of alcoholic parents raised in foster homes with non-alcoholic parent figures and children without a biologic alcoholic parent raised in foster homes with an alcoholic parent figure. For every comparison of the relative influence of having a biologic parent as opposed to having lived with an adoptive

alcoholic parent figure, the biologic influence predominated in relation to the development of alcoholism. (Schuckit, R.J., Goodwin, D.W. and Winokur, G. "A Half Sibling Study of Alcoholism," Amer. J. Psychiat. 1972, 128:1132 - 1136.) A more recent study by R.J. Cadoret and associates confirmed these findings. (Cadoret, R.J., Cain, C.A. and Grove, W., "Development of Alcoholism in Adoptees Raised Apart from Alcoholic Biologic Parents," Arch. Gen. Psychiat. 1980, 37:561 - 563.)

11. A second factor which contributes to the development of alcoholism is the patient's environment and cultural background. It is well established that certain ethnic groups have very low rates of alcoholism and other groups have very high rates independent of the availability of alcohol. Alcohol use differs in function within

and between societies, cultures, subcultures, ethnic, and religious groups. Attitudes concerning the use of alcohol in a society fall within several general types, and help to determine general rates of alcoholism. For example, some societies encourage total abstinence from alcohol, by virtue of religious principles or traditions where drinking alcohol is regarded as a most serious antisocial act without justification, and/or immoral and sinful. Exceptions to these prohibitions are not tolerated and infractions are strongly condemned. There is very little distinction made between the social drinker and the alcoholic since all drinking is condemned. In these societies, alcoholism is relatively rare. In other societies, the use of alcohol is accepted, but only within specific settings, rituals or ceremonial rites.

The incidence of alcoholism varies in these societies according to the degree of controls for strict use and against excesses. Finally, where the use of alcohol, including drinking leading to intoxication, is accepted, as it is within many cultures in the United States, the prevalence of alcoholism is high.

12. My own work and clinical experience has lead me to develop a psychodynamic model of the primary alcoholic (the distinction between primary and secondary alcoholism will be discussed below). I do not believe it is appropriate to look for or to characterize an "alcoholic personality." However, my work in the field has taught me that many alcoholics have suffered from childhood rejection, overprotection, or premature responsibility, which leads to

an unconscious need for nurturance which cannot be met in reality and results in rejection. This rejection leads to anxiety, which in turn leads to the development of a number of defense mechanisms, particularly denial, and a compensatory grandiosity. The grandiosity causes such individuals to try harder and results in inevitable failure. Failures lead to more anxiety, depression, anger and guilt. These unpleasant effects can be reduced by alcohol, at least for a time, and lead to pharmacologically induced feelings of power and omnipotence, thus reinforcing the denial and reactive grandiosity. An individual with such a psychological conflict will become an alcoholic if there is a genetic predisposition to alcoholism (see paragraph 10 above), and if he lives in a society in which the use of alcohol is socially accepted or in which there is

considerable ambivalence regarding the use of alcohol (see paragraph 11 above).

13. As the above discussion indicates, alcoholism is a complex and progressive illness which gradually develops over the course of many years. No one makes a conscious choice to become an alcoholic. Many individuals with a genetic or cultural predisposition toward alcoholism never develop the illness because they do not suffer from the necessary psychological conflict. Others who exhibit the typical psychological traits never develop alcohol abuse problems because of the absence of the genetic component. Persons who do become alcoholic may begin drinking for the same reasons as those who are able to remain social drinkers. The disease is the result of the confluence of a number of predisposing factors. In the final analysis, however, none of these factors -- be they genetic, environmental or

psychodynamic -- are within the conscious control of the individual.

14. Historically, alcoholism has been viewed as a moral weakness by the lay public, and it is clear that there is a behavioral component to the disease. However, the course of a number of diseases, including diabetes, hypertension and lung cancer as well as alcoholism, is influenced by the behavior of the patient. Just as the progress of diabetes is influenced by the diabetic's eating patterns, the progress of alcoholism is influenced by the alcoholic's drinking patterns. Similarly, respiratory illnesses and hypertension are commonly linked to cigarette smoking.

15. In fact, the act of drinking alcohol may be less within the conscious control of the patient than many other debilitating behaviors precisely because the phenomenon of denial

is an integral a part of the disease of alcoholism. A number of researchers have noted that the predominant defense mechanism in the alcoholic is denial. Denial involves the avoidance of awareness of the harmful consequences of drinking. The central problem in the rehabilitation of an alcoholic is breaking through the massive though unconscious denial which is inevitably present. The typical response of an alcoholic is, "I can stop drinking any time I want to." In fact, the patient would not be alcoholic if he had the ability to exert conscious control over his behavior. One of the primary goals of alcoholism treatment, therefore, is to help the alcoholic understand that he is not in reality choosing to drink at all. Once this absence of volition has been brought to the attention of the patient, he has taken a giant step toward overcoming the disease.

16. Chronic use of alcohol produces tolerance to its central nervous system effects, and requires more and more alcohol to produce the mood and behavioral changes sought by the alcoholic. If alcohol is used long enough, an addiction is produced that can result in serious withdrawal reactions that can be life-threatening. The central nervious system mechanics of tolerance and addiction are not fully understood at the present time, but alcohol has profound effects on neuro-transmitters, particularly in producing a rapid turnover of central nervous system norepinephrine. As a result, the alcoholic must gradually increase the amount of alcohol he ingests in order to produce a constant effect. As tolerance increases, so does the physiological addiction. If the alcoholic is unable to maintain the level of alcohol intake his body needs, he will

experience a painful and possibly dangerous withdrawal. In essence, the physiologically dependent alcoholic uses the drug alcohol out of pure physical necessity. Here again, as the physiological need for alcohol increases so does the alcoholic's denial. Each feeds on the other, and they combine to produce a pattern of drinking which the patient can neither control nor understand.

17. A distinction is and can be made between primary and secondary alcoholism. The primary alcoholic has alcoholism as the major disorder with a significant coexisting psychiatric disorder or a psychiatric disorder developed after the onset of the alcoholism. (The psychological conflicts which I have described earlier as typical in primary alcoholics do not rise to the level of psychiatric disorders.) The secondary alcoholic develops alcoholism after the

onset of a major psychiatric disorder such as a severe depression. The psychiatric disorder can be viewed as being a major causal factor in the development of secondary alcoholism. This distinction is an important one to be aware of in planning the treatment of an alcoholic patient. If a patient presents evidence of alcoholism along with signs and symptoms of another psychiatric disorder, it is necessary to determine if the onset of the alcohol problem preceded or followed the development of the psychiatric disorder. The only way to be reasonably certain that a particular individual's alcoholism is either primary or secondary to another psychiatric disorder is to observe the patient alcohol-free for three to four weeks. If the psychiatric signs and symptoms persist in an alcohol-free state, one can assume the presence of a primary psychiatric disorder.

18. In my years of clinical experience treating and supervising the treatment of thousands of alcoholics, and in the course of my research on the treatment and diagnosis of alcoholism, I have found that many patients have been incorrectly diagnosed. In fact, it has been my experience that the diagnosis which is made in the case of a particular patient -- whether it be primary alcoholism or alcoholism secondary to a primary psychiatric disorder -- is often a function of the nature of the treatment facility itself, and has little to do with the patient's clinical and social history. Thus, patients who are diagnosed in a psychiatric facility are more like to be described as secondary alcoholics, while patients treated in detoxification units of general hospitals are usually given a diagnosis of primary alcoholism. I believe that an accurate

differential diagnosis can be made in alcoholism cases. In order to accomplish this, however, a patient must remain in treatment for three to four weeks. Because many patients who are clearly alcoholic are detoxified and released after a much shorter period of hospitalization, an accurate differential diagnosis as to the type of alcoholism from which they suffer is not possible.

19. I have been informed by counsel for Mr. Traynor that it is the policy of the Veterans Administration to deny an extension of delimiting date for receiving education benefits to a veteran whose sole disability is primary alcoholism. I understand that this policy is due to Veterans Administration regulations which presume primary alcoholism to be (an/or to be the result of) "willful misconduct (as that term is defined in Veterans Administration §§ 3.1(n) and

3.301(c)(2), which I have read.) It is my professional judgment that this characterzation of the illness and the attendant policy is in conflict with the weight of available medical evidence, and shows a clear misunderstanding of the nature and causes of alcoholism. I know of no competent expert in the field of alcoholism who would agree with the Veterans Administration's description of alcoholism as resulting from willful misconduct.

20. I have also read Administrator's Decision, Veterans Administration No. 988 (August 13, 1964), which provides in part:

> . . . With common social acceptance of the use of alcohol as a beverage, onset of the secondary condition may be very insidious in its development. Under such circumstances the development of the secondary condition does not meet the definition of intentional

> wrong-doing with knowledge or wanton disregard of its probable consequences. Secondary results are not the usual and probable effects of drinking alcohol as a beverage. By the time there is sufficient awareness of any probable deleterious consequences, the process has developed to a point where it is irreversible without professional help. At such time, the person by himself, may lack the capacity to avoid the continued use of alcohol. While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and wills the disease and disabilities which sometimes appear as secondary effects.

It is my professional judgment that this description of the development of secondary conditions resulting from a primary alcoholism applies with equal force to the development of primary alcoholism as well. In fact, the above quoted language from Administrator's Decisin 988 is a

more accurate description of the development of primary alcoholism that it is of the secondary organic conditions which may result, since it is the underlying alcoholism and not the secondary condition which is the disease.

21. I have reviewed the records from Mr. Traynor's five hospitalizations which occurred during the period between 1970 and 1974. On the basis of the information contained in those records (see Exhibit B.2), it is my professional opinion that Mr. Traynor suffered from alcoholism and was physically addicted to the use of alcohol.

22. I have personal knowledge of the facts stated herein.

/s/
SHELDON ZIMBERG, M.D.
127a East 71st Street
New York, New York 10021

Sworn to before me this
29th day of March, 1986

/s/
Notary Public

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of May, one thousand nine hundred and eighty-six.

Present: HON. WILLIAM H. TIMBERS

HON. AMALYA L. KEARSE

HON. GEORGE C. PRATT,

Circuit Judges,

EUGENE TRAYNOR, Plaintiff-Appellee, v. HARRY W. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, Defendants-Appellants.	No. 85-6208

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against appellee.

Elaine B. Goldsmith
Clerk

/s/
By: Edward J. Guardaro
Deputy Clerk

EXCERPT FROM
TRANSCRIPT OF JULY, 1980 PROCEEDINGS
BEFORE THE BOARD OF VETERANS APPEAL
JAMES P. McKELVEY

* * * *

[Page 16]

Mr. Chairman:

Thank you Mr. Larama. Mr. McKelvey before I turn the questioning over to Dr. Weinstein I want to make one thing clear so that we can channel your testimony throughout the remainder of the Hearing along lines that would be important in our consideration whether or not there is a basis to allow this appeal and that is, I am aware of the medical disagreement about what kind of an animal alcoholism is. As far as we are concerned at the Board of Veterans Appeals, we don't have discretion to say that primary alcoholism is a disease. It is

defined in regulations as willful misconduct and whether we want to call it a disease or not, we have no authority to do that, we're bound by those regulations, so what we're after as Mr. Larama may have indicated to you, is some evidence that the alcoholism may have been secondary to a psychiatric

[Page 17]

or organic condition of some kind rather than existing on a primary basis or alternatively, that there were other conditions either psychiatric or organic which in themselves would have precluded you from pursuing a course of education during the relevant period. So having made these remarks I will now turn the questions over to Dr. Weinstein.

* * * *

IN THE APPEAL OF
JAMES P. MCKELVEY C 28 871 132

BOARD OF VETERANS APPEALS
Washington, D.C. 20420

FINDINGS AND DECISION) Docket No.
) 79-04 991
)
) Date
August 6, 1980

THE ISSUE

Entitlement to an extension of the veteran's delimiting date for educational assistance benefits.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

James P. McKelvey, appellant

CONSULTATIONS BY THE BOARD

Francis F. Talbot, Staff Legal Adviser

ACTIONS LEADING TO PRESENT APPELLATE STATUS

This case was before the Board in June 1979, at which time it was remanded for additional development. The requested development has been attempted and the case has been returned to the Board for further appellate review.

CONTENTIONS

The veteran and his representative contend, in essence, that it is unclear whether the veteran's drinking problem or emotional problem began first; that he was treated in service at a mental hygiene clinic; that conditions beyond his control prevented him from completing his program of education before his delimiting date; that, while he was treated for alcoholism, treatment was also extended for conditions secondary to his alcoholism; that the veteran suffered

from fear, anxiety and depression; and that he has not had a drink since May 10, 1975.

THE EVIDENCE

The veteran served on active duty from September 1963 to September 9, 1966. On report of medical history completed by the veteran in conjunction with his entrance examination, he stated he had or had had nervous trouble. Service medical records reflect that on January 7, 1964, he was seen because of problems sleeping at night. He was reassured and referred to the mental hygiene clinic. On January 8, 1964, he was seen by the mental hygiene clinic for a followup. On report of medical history completed by the veteran in conjunction with his separation examination, he did not note any psychiatric problems. The veteran received

Chapter 34 benefits for training conducted from January 1973 to May 1973. The veteran's application for extension of his delimiting date was received by the Veterans Administration in November 1977. In January 1978, the Veterans Administration received a statement dated in October 1977 from D.B.V., M.D. The doctor stated that the veteran had been treated for a depressive reaction precipitated by injury to his left medial meniscus which occurred in October 1976. The Veterans Administration was notified in February 1978 that the veteran was a patient at the Washington Adventist Hospital from March 23 to 24, 1971, with a diagnosis of acute and chronic alcoholism; on August 23, 1971, with a diagnosis of acute alcoholism; from September 5 to 7, 1971, with a diagnosis of acute and chronic alcoholism; from November 24 to 26, 1972, with a

diagnosis of acute and chronic alcoholism; from January 23 to 24, 1973, with a diagnosis of acute and chronic alcoholism; and from February 27, 1977, through March 3, 1977, with a diagnosis of torn medial meniscus, left knee arthrotomy, meniscectomy.

J.R.C. reported in a statement in January 1978 that the veteran had been known to the Montgomery County Health Department Alcohol Program since March 1971 and that at that time he was transferred to their detoxification center, and then to a hospital center. It was also reported that from March 1971 until May 1975, the veteran was in and out of their program and many other programs as a practicing chronic alcoholic plus all the other mental and physical problems related to continuous alcohol abuse.

In a statement dated in March 1978, it was reported that the veteran was admitted to the Maplewood Quarterway House for alcoholism from April 1, 1973, through April 13, 1973; August 26, 1973, through August 28, 1973; and on May 8, 1975. In April 1978, the Veterans Administration was notified that the veteran was a patient at Montgomery General Hospital from February 9, to February 12, 1974, and from October 12 to October 19, 1974, and that his diagnosis for both admissions was alcoholism.

In August 1978, the Administration received a statement prepared for the signatures of K.B. and Dr. V. The statement was dated in August 1977. It was reported that the veteran was currently experiencing a depressive reaction precipitated by his left knee injury

which occurred in October 1976 and by his heat prostration which occurred in August 1977. It was reported further that they felt that the veteran had a potential for depression which was concealed by his former alcoholism.

In August 1978, the Veteran Administration received medical records entered during the veteran's various periods of hospitalizations from 1971 through 1974. During hospitalization from March 24 to April 6, 1971, the veteran's judgment was impaired and he had partial insight. The diagnosis was alcohol addiction. Hospitalization in June 1971 resulted in a diagnosis of alcohol addiction. During hospitalization from September 15 to 17, 1971, it was reported that the veteran had fear and/or anxiety, loosening of associations, impaired judgment and partial insight.

Discharged summary dated October 12, 1971, revealed that the veteran was rehospitalized on September 25, 1971. On admission, he showed marked dermatitis on his face and arms, which the veteran reported was of 10 days' duration. He was coherent and relevant in his speech but verbally overproductive. Affect was appropriate and mood was anxious. He was correctly oriented in three spheres and memory was intact. Insight and judgment were limited. Routine laboratory workup was within normal limits. The final diagnoses were alcoholic psychosis, other alcoholic hallucinosis; and alcohol addiction.

The veteran was hospitalized from December 28 to 30, 1971. He had fear and/or anxiety, impaired judgment, and partial insight. Physical examination was within

normal limits and the discharge diagnosis was alcohol addiction. During hospitalization from May 14 to 17, 1973, it was reported that physical examination was within normal limits. The veteran's judgment was impaired and he had no insight. The discharge diagnosis was alcohol addiction. He was readmitted on May 20, 1973, and he remained until he eloped in May 1973. During this hospitalization, his judgment was impaired and he had no insight. Final diagnosis was alcohol addiction.

The veteran was hospitalized from February 9 to 12, 1974. He was admitted because of acute symptoms of anxiety and acute alcoholism. The final diagnoses were psychoneurotic reaction and acute alcoholism.

The veteran was hospitalized from October 12 to 19, 1974. The admission was prompted by an episode of acute episodic alcoholism. During the week before admission, the veteran had massive, excessive drinking with the onset of very severe upper gastrointestinal pains, hematemesis and black tarry stools. Mental status examination on admission revealed a very anxious physically distressed male whose face was flushed. He was having severe alcohol withdrawal and unquestionably he had physical pain. Stools were initially positive and then they became negative. Upper gastrointestinal series was within normal limits and the veteran's gastrointestinal symptoms rapidly subsided with a bland diet. Liver function studies showed marked disturbances of liver enzymes. Glucose tolerance test showed a very sharp drop

in the blood sugar to the level of 63 at the fourth hour. The final diagnoses were alcohol addiction, marked alcoholic gastritis, and marked psychopathic personality.

In August 1978, the Veterans Administration received a statement prepared for the signatures of K.B. nd Dr. V. The statement is dated in September 1977 and is substantially to the same effect as their statement dated in August 1977.

The Veterans Administration also received in August 1978 a summary of the first interview Dr. V. had with the veteran in August 1977. It was reported that the veteran felt depressed, anxious, and tense. These feelings were the result of problems associated with his employment. The doctor expressed the opinion that the

veteran's depression was precipitated by his injury and subsequent surgery. The doctor also stated that he felt the veteran had the potential for depression for a long while, but this was covered up by his alcoholism.

The veteran appeared at a hearing conducted by the Board of Veterans Appeals in July 1980. During the hearing, a statement from J.F.C., M.D., dated in May 1979, along with Dr. C.'s resume, was submitted. The doctor stated that he had known the veteran for 7 1/2 years; that the veteran was his patient from 1971 to 1975; that the veteran was a disturbed young man who was impulsive, explosive, and frequently suicidal; and that the veteran had a serious drinking problem secondary to his anxiety. The doctor reported further that, psychiatrically,

with the veteran's anxiety, paranoia, depression and hysteria, he was clearly suffering from a borderline personality (schizophrenic reaction--latent type). He noted that these diagnoses were established during hospitalizations from 1971 to 1973. The veteran testified during the hearing that he began drinking at age 13 for the purpose of relieving anxiety; that during service, he drank to relive tension; that his drinking made him physically sick; that he was hospitalized 33 times from 1971 to 1975; that the hospitalizations were caused by physical distress; that currently he is not receiving psychiatric treatment; and that he had a great deal of difficulty adopting to service.

THE LAW AND REGULATIONS

No educational assistance benefits shall be afforded an eligible veteran under Chapter 34 beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955, or December 31, 1989, whichever is earlier. A veteran may be granted an extension of the applicable delimiting period if the veteran was prevented from initiating or completing the chosen program of education within the otherwise applicable delimiting period because of a physical or mental disability that did not result from the willful misconduct of the veteran. It must be clearly established by medical evidence that such a program of education was medically infeasible. A veteran who is disabled for a period of 30 days or less will not be considered as having been prevented

from initiating or completing a chosen program, unless the evidence establishes that the veteran was prevented from enrolling or reenrolling in the chosen program of education, or was forced to discontinue attendance, because of the short disability. (38 U.S.C. 1662(a); 38 C.F.R. 21.1042, 21.1043)

The simple drinking of alcoholic beverages is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If in drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic

diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. (38 C.F.R. 3.301(c)(2))

DISCUSSION AND EVALUATION

Under the regulations, the disability of alcoholism is considered to be of willful misconduct origin and may not be a basis for an extension of the delimiting date for Chapter 34 benefits whenever it exists as a primary condition. The record shows numerous hospitalizations from 1971 to 1974 caused by alcoholism. During some of those hospitalizations, physical disabilities were noted, but those physical disabilities were not of sufficient magnitude or duration so as to prevent the veteran from pursuing training

under Chapter 34. During the veteran's brief hospitalization in February 1974, the diagnosis of a psychoneurotic reaction was entered. However, the record fails to establish that the veteran's alcoholism is the result of a neurosis. He began drinking at age 13 and there is no evidence that an acquired psychiatric disease preceded the veteran's alcoholism. The veteran is not currently receiving psychiatric care, which supports the position that his alcoholism was not the result of an acquired psychiatric disease. Simply stated, the evidence does not establish that any innocently acquired disability the veteran may have experienced during the period September 1966 to September 9, 1976, was of sufficient magnitude or duration so as to preclude training. Therefore, there is no basis on which to grant the veteran an extension

of his delimiting date. We have no doubt that if an extension were granted the veteran would use the benefits wisely and become a more productive member of society. Regrettably, an extension of the veteran's delimiting date for educational assistance benefits is not warranted.

FINDINGS OF FACT

1. During the period 1971 to 1974, the veteran was hospitalized a number of times because of alcoholism. The alcoholism was shown to be a primary condition.

2. There was no innocently acquired disability during the period September 1966 to September 9, 1976, which was of sufficient severity so as to prevent the veteran from pursuing training during this period.

CONCLUSION OF LAW

The requirements for extension of the veteran's delimiting date for educational assistance benefits beyond September 9, 1976, are not met. (38 U.S.C. 1662(a); 38 C.F.R. 3.301(c)(2), 21.1042, 21.1043)

DECISION

Entitlement to an extension of the veteran's delimiting date for educational assistance benefits is not established. The appeal is denied.

/s/
J.J. SCHULE

/s/
JACOB J. WEINSTEIN, M.D.

/s/
BRUCE E. HYMAN

IN THE APPEAL OF
JAMES P. MCKELVEY C 28 871 132

BOARD OF VETERANS APPEALS
Washington, D.C. 20420

FINDINGS AND DECISION) Docket No.
RECONSIDERATION) 79-04 991
)
) Date
) February 23, 1982

THE ISSUE

Entitlement to an extension of the veteran's delimiting date for educational assistance benefits.

REPRESENTATION

Appellant represented by: Anne E. Moran, Attorney at Law

WITNESS AT HEARING ON APPEAL

James P. McKelvey, appellant

CONSULTATIONS BY THE BOARD

William J. Reddy, Staff Legal Adviser

ACTIONS LEADING TO PRESENT APPELLATE STATUS

In August 1980, the Board denied an extension of the veteran 's delimiting date for educational assistance benefits. Pursuant to a request by the veteran and his representative, an enlarged panel has been convened for the purpose of reconsidering the case.

CONTENTIONS

In their request for reconsideration, the veteran and his representative set forth five separate contentions:

(1) The Board's determination that the veteran's chronic alcoholism was "willful misconduct" was erroneous;

(2) The Board was incorrect in failing to find that the veteran's mental anxiety

caused his alcoholism and prevented him from using his educational benefits;

(3) The Board was incorrect in failing to find that the veteran's mental anxiety was a secondary result of his alcoholism, and of sufficient severity to entitle him to an extension of his benefits under the regulations; and

(5) The veteran's medical records demonstrated physical disabilities due to alcoholism that entitled him to an extension of his benefits.

FINDINGS OF FACT

After careful consideration of the entire evidentiary record, the Board's prior decision, and the arguments advanced by

the appellant, the Board finds the following:

1. The veteran served on active duty from September 1963 to September 1966.

2. In its decision of August 1980, the Board found that, during the period of 1971 to 1974, the veteran was hospitalized a number of times because of alcoholism. The alcoholism was shown to be a primary condition. The Board also found that the veteran had no innocently acquired disability during the period September 1966 to September 9, 1976, which was of sufficient severity so as to prevent the veteran from pursuing training during this period. The Board determined that, under the regulations, the disability of alcoholism is considered to be of willful misconduct origin and

may not be a basis for an extension of the delimiting date for Chapter 34 benefits whenever it exists as a primary condition. It was noted that, during some of the veteran's hospitalizations for alcoholism, physical disabilities were found but the physical disabilities were not of sufficient magnitude or duration so as to prevent the veteran from pursuing training under Chapter 34. It was also noted that, during a brief hospitalization in February 1974, a diagnosis of psychoneurotic reaction was made. It was further determined that the record failed to establish that the veteran's alcoholism was the result of a neurosis. The Board observed that the veteran began drinking at age 13 and there was no evidence that an acquired psychiatric disease preceded the veteran's alcoholism.

3. The Board finds no obvious error in its decision of August 1980.

THE LAW AND REGULATIONS

The decision of the Board of Veterans Appeals is final, except that the Board may correct an obvious error in the record. Reconsideration of an appellate decision may be accorded by the Board of Veterans Appeals. (38 U.S.C. 4003: 38 C.F.R. 19.148)

No educational assistance benefits shall be afforded an eligible veteran under Chapter 34 beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955, or December 31, 1989, whichever is earlier. A veteran may be granted an extension of the applicable delimiting period if the veteran was prevented from

initiating or completing the chosen program of education within the otherwise applicable delimiting period because of a physical or mental disability that did not result from the willful misconduct of the veteran. It must be clearly established by medical evidence that such a program of education was medically infeasible. A veteran who is disabled for a period of 30 days or less will not be considered as having been prevented from initiating or completing a chosen program, unless the evidence establishes that the veteran was prevented from enrolling or reenrolling in the chosen program of education, or was forced to discontinue attendance, because of the short disability. (38 U.S.C. 1662(a); 38 C.F.R. 21.1042, 21.1043)

The simple drinking of alcoholic beverages is not of itself willful misconduct. The

deliberate drinking of a known poisonous substance or other conditions which would raise a presumption to that effect will be considered willful misconduct. If in drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. (38 C.F.R. 3.301(c)(2))

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A

reasonable doubt means a substantial doubt and one within the range or probability as distinguished from speculation or remote possibility. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

A final decision of the Board of Veterans Appeals may not be reversed except upon a finding of obvious error. To constitute obvious error, the evidence must be so persuasive of facts contrary to the Board's prior decision as to preclude any other determination. We find no such error in the instant case.

The appellant's primary contention is that the applicable regulation cannot be interpreted to define chronic alcoholism as willful misconduct. It has been the consistent interpretation by the Board that the regulation defines alcoholism as

the "deliberate drinking of a known poisonous substance," and, therefore, is willful misconduct. We are cognizant of the arguments advanced by the appellant against this interpretation. However, we are firm in our belief that the regulation does, indeed, define alcoholism as willful misconduct.

It is also contended that the veteran's psychoneurotic problem, singly, and in relation to his alcoholism, can be used as a basis for an extension of the delimiting date. However, the evidence establishes that the veteran's primary disability was alcoholism, for which he was hospitalized on many occasions. The evidence simply does not establish that the veteran's psychoneurotic problem was of sufficient severity as to prevent him from using his benefits. Similarly, the

medical evidence fails to indicate that the veteran's physical disabilities were of such magnitude or duration as to prevent him from pursuing training.

After a careful review of the entire evidentiary record and careful consideration of the appellant's arguments, we must conclude that the veteran failed to use his benefits by reason of his alcoholism. Accordingly, we must also concluded that the Board's prior decision does not contain obvious error.

The doctrine of reasonable doubt has been considered, but the facts of this case raise no such doubt.

CONCLUSION OF LAW

The decision entered by the Board in August 1980 denying an extension of the

veteran's delimiting date for educational assistance benefits represents the correct application of the governing laws and regulations to the facts found to be shown by the evidence and does not involve obvious error. (38 U.S.C. 4003; 38 C.F.R. 3.102, 19.148)

DECISION

Obvious error not having been found on reconsideration, the Board's decision of August 1980 is affirmed as a final determination. On reconsideration, the benefit sought on appeal remains, denied.

/s/
JACK W. BLASINGAME

/s/
B.G. BROWN, M.D.
(Substituting for DR. WEINSTEIN, who is on extended leave.)

/s/
J.J. SCHULE

/s/
H.H. CLARK

/s/
W.H. YEAGER, M.D.

/s/
C.D. ROMO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES P. McKELVEY
6972 Deep Cup
Columbia, Maryland 21045
(312) 565-7685

Plaintiff,

v.

HARVEY N. WALTERS,

Administrator of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D. C. 20420,

and

VETERAN'S ADMINISTRATION
810 Vermont Avenue, N.W.
Washington, D. C. 20420,

Defendants.

Civil Action No. 83-2063

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND MONEY DAMAGES

This action for declaratory and injunctive relief and for money damages challenges the legality of a

regulation of the Veterans Administration which defines alcoholism as "willful misconduct" and thereby denies certain veterans benefits to individuals entitled to those benefits. This regulation exceeds the statutory authority of its promulgators, creates an irrebutable presumption in violation of the due process clause of the Fifth Amendment, denies those veterans who suffer from alcoholism not caused by "willful misconduct" the equal protection of the laws guaranteed by the Fifth Amendment, and discriminates against the handicapped in violation of the Rehabilitation Act of 1973.

Jurisdiction and Venue

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1361, and 29 U.S.C. § 794a(a)(2).

2. Venue is proper in this judicial district, in accordance with 28 U.S.C. § 1391(e), because this district is the official residence of defendants.

Parties

3. Plaintiff JAMES P. McKELVEY is a veteran who served in the United States Army from September 1963 to September 1966, and who received an honorable discharge. Mr. McKelvey is a citizen and resident of the State of Maryland.

4. Defendant HARVEY N. WALTERS is the Administrator of Veterans Affairs in Washington, D. C. Defendant is sued in his official capacity. As Administrator, he is responsible for executing the laws relating to veterans benefits and for promulgating regulations that are consistent therewith.

5. Defendant VETERANS ADMINISTRATION is that part of the executive branch responsible for administering the laws relating to veterans benefits. 38 U.S.C. § 210.

FACTS

6. Congress has provided certain educational benefits for veterans that are administered by defendants. James P. McKelvey's honorable service in the United States Army entitled him to these benefits, which, under 38 U.S.C. §§ 1661 and 1662(a)(1), must have been used within ten years after his discharge. Section 1662(a)(1) extends the delimitating date if an educational program could not be initiated or completed within the ten-year period because of a disability that was not the result of the veteran's own "willful misconduct." Defendants have denied Mr. McKelvey an extension of time solely

because of a regulation that conclusively and irrebuttably defines alcoholism as "willful misconduct."

7. Mr. McKelvey began drinking alcoholic beverages at age 13. Both his father and an older brother were alcohol abusers and died as a result of alcohol-related causes.

8. On September 9, 1963, Mr. McKelvey enlisted in the United States Army. During his enlistment, he received several disciplinary sanctions, all drinking-related. He was honorably discharged from the Army on or about September 9, 1966.

9. From 1971 to 1975, Mr. McKelvey underwent 33 successive hospitalizations for alcoholism and/or psychiatric disorders. Between hospitalizations, Mr. McKelvey attended two different educational institutions at which he used his veterans benefits. He

was unable to complete either program because of the debilitating effects of his alcoholism.

10. Mr. McKelvey had his last drink of an alcoholic beverage on or about May 10, 1975. He subsequently received regular psychiatric treatment for depression and phobias. He has been employed on a full-time basis since July, 1975, and for the past four years has been employed by Montgomery County, Maryland, as an alcoholism counselor.

11. On September 9, 1976, the statutory delimiting date for Mr. McKelvey's educational benefits took effect. On November 10, 1977, Mr. McKelvey filed, pursuant to 38 U.S.C. § 1662(a), an application for extension of that delimiting date with defendant Veterans Administration.

12. The Veterans Benefit Law defines "disability" for purposes of

determining claims for veterans benefits, and for determining requests for extensions of time pursuant to 38 U.S.C. § 1662(a)(1), as meaning "a disease, injury, or other physical or medical defect." 38 U.S.C. § 601(1).

13. Alcoholism is a "disability" within the meaning of 38 U.S.C. §§ 601(1) and 1662(a)(1).

14. The Veteran's Benefit Law does not define "willful misconduct." Defendants' pertinent regulation, 38 C.F.R. § 3.301(c)(2), provides as follows:

> The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and

> disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

15. Mr. McKelvey's application was denied solely on the ground that under Veterans Administration regulations, 38 C.F.R. § 3.301(c)(2), alcoholism is considered "willful misconduct," and thus is barred as a basis for extension of benefits under 38 U.S.C. § 1662(a)(1).

16. The denial of Mr. McKelvey's application was appealed timely and in accordance with Veterans Administration procedures. On August 6, 1980, the Board of Veterans Appeals denied the appeal solely on the basis of 38 C.F.R. § 3.301(c)(2). It refused to consider any evidence that Mr. McKelvey's alcoholism was not caused by "willful misconduct," concluding that it

was bound by defendants' regulation.

17. Mr. McKelvey filed a request for reconsideration with the Board on August 4, 1981. On February 23, 1982, the Board affirmed its prior decision.

18. Mr. McKelvey has exhausted his administrative remedies.

Claims for Relief

19. Alcoholism is not necessarily caused by "willful misconduct" and thus may constitute a disability within the meaning of 18 U.S.C. § 1662(a)(1). Mr. McKelvey's alcoholism was not caused by "willful misconduct," and was a disability under the statute. Consequently, Mr. McKelvey was entitled to an extension of his delimiting date.

20. Defendants' regulation, 38 C.F.R. § 3.301(c)(2), denies veterans suffering from alcoholism not caused by "willful misconduct" those educational

benefits to which they are entitled by Act of Congress, and therefore exceeds defendants' statutory authority under 38 U.S.C. § 210(c)(1).

21. Moreover, defendants' regulation creates an irrebuttable presumption in violation of the due process clause of the Fifth Amendment, and further violates the Fifth Amendment by denying the equal protection of the laws to veterans who suffer from alcoholism not caused by "willful misconduct."

22. The Rehabilitation Act of 1973, as amended in 1978, 29 U.S.C. § 706(7), provides that persons with a history of alcoholism are "handicapped" and entitled to its protection. Defendant Veterans Administration is required to comply with Section 504 of the Act, 29 U.S.C. § 794, which provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive Agency . . . .

The Act further provides that defendants "shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation . . . Act of 1978." Defendants have failed to review their existing regulations and to promulgate new regulations which satisfy their obligations under the Rehabilitation Act, as amended, and have otherwise violated plaintiff's statutory right to nondiscrimination.

23. As a result of defendants' misconduct, plaintiff has suffered and will continue to suffer irreparable injury. Among other things,

he has been unable to complete a course of study which would enable him to pursue his desired occupation, and has therefore lost several years during which he could have utilized his skills and experience in the manner most beneficial both to himself and to society. He has also been stigmatized, as have all veterans suffering from the disease of alcoholism, by defendants' insistence, contrary to medical evidence, that he was the sole cause of the disease from which he suffered.

24. As a further result of defendants' misconduct, plaintiff has suffered monetary damages in an amount of not less than $2,000 for expenses incurred in pursuing an education that should properly have been borne by defendants, and will suffer further damages in the pursuit of his education absent the relief requested.

WHEREFORE, plaintiff requests the Court to:

(A) Enter a declaratory judgment that the challenged regulation, 38 C.F.R. § 301(c)(2), violates 38 U.S.C. §§ 210(c)(1), 1661 and 1662(a)(1), the due process and equal protection clauses of the Fifth Amendment, and 29 U.S.C. §§ 706(7) and 794.

(B) Issue a permanent injunction:

1. Restraining defendants and their agents and appointees from applying 38 C.F.R. § 301(c)(2) to plaintiff;

2. Granting plaintiff's application for an extension of his delimiting date or, alternatively, remanding the case to defendant Veterans Administration with directions that defendants reconsider Mr. McKelvey's

application without regard to 38 C.F.R. § 3.301(c)(2); and

3. Requiring defendants to amend and promulgate regulations by Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and to do so pursuant to the procedures set forth in the Administrative Procedure Act, 5 U.S.C. § 553, and 38 C.F.R. § 1.12.

(C) Award plaintiff his damages.

(D) Award plaintiff the costs of this action, including reasonable attorneys fees.

(E) Grant plaintiff such other and further relief as may be appropriate.

Respectfully submitted,

/s/Douglas E. Winter
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Date: July 19, 1983

SUPREME COURT OF THE UNITED STATES

No. 86-737

James P. McKelvey,

Petitioner

v.

Thomas K. Turnage, Administrator, Veterans Administration, et al.

ORDER ALLOWING CERTIORARI.
Filed March 9, 1987.

The petition herein for a writ of certiorari [to] the United States Court of Appeals for the District of Columbia is granted. This case is consolidated with 86-622, Eugene Traynor v. Thomas K. Turnage, Administrator, Veterans Administration, et al., and a total of one hour is allotted for oral argument.

Justice Scalia took no part in the consideration or decision of this petition.

ADMINISTRATOR'S DECISION, VETERANS' ADMINISTRATION, NO. 2

March 21, 1931.

Subject: Interpretation of term "willful misconduct" in disability allowance provision.

QUESTION PRESENTED: Whether certain veterans who are suffering from jaic paralysis are barred from receiving disability allowance on the theory that the disability is the result of their own willful misconduct.

COMMENT: Claimants are suffering from paralysis caused by drinking so-called jamaica ginger. The second paragraph of section 200 of the World War Veterans' Act, as amended July 3, 1930, authorizes the payment of disability allowance to "any honorably discharged

ex-service man who entered the service prior to November 11, 1918, and served 90 days or more during the World War, and who is or may hereafter be suffering from a 25 percentum or more permanent disability, as defined by the director, not the result of his own wilful misconduct * * *."

In passing on the question as to whether a claimant who became blind from wood alcohol poisoning as result of drinking whiskey, was entitled to disability allowance, the Attorney General of the United States in an opinion dated January 20, 1931, held that the phrase "willful misconduct" involves something in the n ature of conscious wrongdoing and said:

> There being no law prohibiting the drinking of intoxicating liquor, no evidence that the veteran knew the liquor might blind him, in short, no evil intent of any kind, I am of the opinion that the veteran is eligible to receive a disability allowance.

The Attorney General further referred to the fact that the Supreme Court of the United States in the case of United States v. Farrar, 281 U.S. 624, held that the ordinary purchaser of intoxicating liquor is not subject to prosecution under the National Prohibition Act. It follows that a disability resulting from drinking jamacia ginger, a substitute for intoxicating liquor, is not, generally speaking, the result of the claimant's own wilful misconduct. This rule can not be applied to bring in all cases of disability resulting from drinking jamaica ginger nor all of those in which disability is due to the drinking of whiskey or other intoxicants. The main principle involved is that the simple drinking of any alcoholic beverage, whether jamaica ginger, whiskey or other liquor, is not in and of itself wilful misconduct. However, in the event other

circumstances exist in a given case, such as deliberate drinking where the drink was known to be poisonous, or under conditions which would raise a presumption to the effect, the element of wilful misconduct immediately assumes proportions. Further, if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, wilful misconduct would undoubtedly inhere in the act but where, as is true in the jaic paralysis cases which are presented here for consideration, indulgence leads to disability because the beverage itself is poisonous and essentially destructive of life and health, although the drink which they believe they are taking would not be, wilful misconduct can not be found in the absence of other circumstances from which it can be imputed. An examination

of the three cases submitted for decision does not disclose any evidence along this latter line.

HELD: The claimants are not within the prohibition of the misconduct clause of the disability allowance provision. (Decision of the Administrator of Veterans' Affairs, dated Mar. 13, 1931.)

The foregoing decision is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

FRANK T. HINES,
Administrator of Veterans' Affairs.

ADMINISTRATOR'S DECISION, VETERANS' ADMINISTRATION NO. 988, August 13, 1964

Subject: INTERPRETATION OF THE TERM "WILLFUL MISCONDUCT" AS RELATED TO THE RESIDUALS OF CHRONIC ALCOHOLISM

QUESTION PRESENTED: Whether changes should be made in the criteria currently followed for determining when disability or death is the result of the veteran's own willful misconduct because of use of alcohol as a beverage.

COMMENTS: Statutes currently authorizing disability and death compensation, dependency and indemnity compensation, and pension benefits preclude payment of such benefits when it is determined that the disability or death is the result of the veteran's own willful misconduct. See for example 38 U.S.C. 105, 310, 410(a) and 521(a). The provisions thereof respecting willful

misconduct are similar to corresponding ones in earlier statutes previously in effect for many years. See section 300 of the former War Risk Insurance Act and section 200 of the former World War Veterans' Act, 1924. Of note also are similar provisions in the former Veterans' Regulation No. 10, with respect to benefits under Public No. 2, 73d Congress.

Criteria now applicable generally for determining when disability or death is the result of misconduct because of the use of alcohol as a beverage are set out in Administrator's Decision No. 2 promulgated March 21, 1931. Such general criteria are summarized in paragraph 14.04c of M21-1, in part, as follows:

"Basic principles for application in deciding cases involving alcoholism

are stated in Administrator's Decision No. 2, under which a finding of willful misconduct is to be made where a veteran drinks a poisonous beverage (methyl alcohol), knowing it to be poisonous or under circumstances that would raise a presumption to that effect, or when he drinks any alcoholic beverage for the purpose of enjoying its intoxicating effects and indulges to such an extent that his excessive indulgence results in a disease or disability. Excessive indulgence is not confined to the cases of chronic alcoholics and the fact that a veteran was not a chronic alcoholic is not material. The question involved is: Was there excessive indulgence and was it the proximate cause of the injury or disease in question."

In the present VA Regulation 1001(N) it is said that willful misconduct "means an act involving conscious wrongdoing or known prohibited action"; and that "it involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." The regulation provides further that "willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death."

The injurious effects of drinking alcohol may be placed generally into two distinct groups:

(a) The proximate and immediate effects consisting of disabling injuries or death resulting from a state of intoxication, and,

(b) The remote, organic secondary effects of the continued use of alcohol resulting in impairment of body organs or systems leading to disability or death.

One can, and very reasonably should, be held responsible for the extent and degree of his own drunkeness on individual occasions. So, to willingly achieve a drunken state and while in this condition to undertake tasks for which his condition renders him physically and mentally unqualified, is to act "with wanton and reckless disregard" of the probable consequences of drinking. Such, of course, is willful misconduct. In misconduct determinations, however, with respect to mental disorders where the use of alcohol as a beverage has been involved, a distinction has heretofore been recognized between alcoholism as a

primary condition (or as secondary to an underlying personality disorder), and alcoholism as secondary to and a manifestation of an acquired psychiatric disorder. If the latter condition is found the resulting disability or death is not to be considered as willful misconduct.

The principle thus recognized is applicable to other than mental disorders. With common social acceptance of the use of alcohol as a beverage, onset of the secondary condition may be very insidious in its development. Under such circumstances the development of the secondary condition does not meet the definition of intentional wrongdoing with knowledge or wanton disregard of its probable consequences. Secondary results are not the usual and probable effects of drinking alcohol as a beverage. By the

time there is sufficient awareness of any probable deleterious consequences, the process has developed to a point where it is irreversible without professional help. At such time, the person by himself, may lack the capacity to avoid the continued use of alcohol. While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and wills the disease and disabilities which sometimes appear as secondary effects. These may range from cirrhosis of the liver to gastric ulcer, peripheral neuropathy, vitamin deficiency, chronic brain syndrome or simply acceleration of debility of age. These diseases also appear in the population without any relation to alcohol. Such resulting secondary conditions may properly be

excluded in the criteria respecting willful misconduct without doing harm to the language or intent of the applicable statutes.

It should be noted, further, that, historically, the question of willful misconduct has never been raised in other related situations where personal habits or neglect are possible factors in the incurrence of disability. For example, the harmful effects of tobacco smoking on circulation and respiration were known long before tobacco was incriminated as a causative factor in the high incidence of cancer, emphysema and heart disease. Yet smoking has not been considered misconduct. It is unreasonable and illogical to apply one set of rules with respect to alcohol and a different one in a situation closely analogous.

HELD: Current criteria concerning the use of alcohol as a beverage and its consequences will be continued except that organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. Administrator's Decision No. 2 is modified accordingly.

This opinion is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

/s/ J. S. GLEASON, Jr.
Administrator

Veterans Administration
Program Guide PG21-1
November 9, 1976

Section 0-17
(Revised)
Change 243

RATING PRACTICES AND PROCEDURES

DISABILITY

MISCONDUCT

Organic Disablement Due to Alcohol. Administrator's Decision 988 removed from the category of misconduct organic disablement which is a secondary result of the use of alcohol as a beverage. This change supersedes the longstanding rule set forth in A.D. 2 which held that willful misconduct would inhere in the act of drinking alcoholic beverages where excessive indulgence led to disability. This change of policy is based on the principle that it cannot be maintained that the veteran expects and "wills" the diseases and disabilities which sometimes appear as secondary effects because of indulgence in alcohol.

The bad effects of drinking alcoholic beverages can be placed generally into two distinct groups:

(a) The proximate and immediate effects consisting of disabling injuries or death resulting from a state of intoxication.

(1) No change is made in the existing rule under which disability or death due to automobile, household or other accidents directly resulting from acute intoxication are classified under willful misconduct.

(2) Injury or death caused by fighting, misuse of firearms, etc., directly and proximately resulting from drunkenness are not compensable or pensionable under this revision.

(b) The remote, organic secondary effect of the continued use of alcohol resulting in impairment of body

organs or systems leading to disability or death.

(1) Under this revision, organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, should not be considered to be of willful misconduct origin.

(2) These conditions may range from cirrhosis of the liver to gastric ulcer, peripheral neuropathy, vitamin deficiency, chronic brain syndrome or simply acceleration of disability of age.

The provisions of VA Regulation 1114(A) are applicable to this liberalization. Benefits under this revision may not be awarded prior to the date of approval, August 13, 1964.

Claims will be adjudicated under this change of policy as they are encountered in the course of otherwise required adjudication.

* * * *

4.04 EXTENSION OF DELIMITING DATE BASED ON DISABILITY

(a) General. The delimiting date of a veteran . . . may be extended if it is determined that he or she was prevented from initiating or completing a chosen program of education because of a physical or mental disability.

(1) In this context, the term, "program of education" refers to a course or curriculum pursued in an educational institution or training establishment (38 U.S.C. 1652(b) and (c), and 1787(c)).

(2) Physical or mental disabilities which result from the

applicant's own misconduct do not qualify the person for an extension of his or her delimiting date.

(3) The length of any extension granted will equal the length of time it is determined that the eligible person was prevented from initiating or completing a program of education within the basic 10-year period of eligibility.

(4) These provisions are retroactive to May 31, 1976.

(b) Application Date. Applications for an extension of a delimiting date under this provision must be received in the VA by the latest of the following dates:

(1) November 23, 1978; or

(2) One year after the veteran's basic delimiting date; or

(3) One year after the date on which the veteran became able to initiate or continue training following

recuperation from the disability.

(c) Application Forms.

* * * *

d. Required Information on Application. Both a statement from the claimant and supporting medical evidence will be required to establish eligibility to an extended delimiting date based on disability.

(1) Statement From Claimant. The claimant must submit a signed statement containing the following information:

(a) The type of disability claimed.

(b) The beginning and ending dates of any period or periods during which the claimant was unable to pursue training because of the claimed

disability, and the claimant's reason(s) for being unable to begin or continue his or her training program due to the disability.

(c) The claimant's statement of how the disability was incurred, if known.

(d) A statement of the claimant's employment history during the period that he or she was unable to pursue training because of the disability. Dates and weekly hours of employment, names and addresses of employers, and types of jobs held should be specified.

(2) Medical Evidence. Medical evidence clearly establishing the nature and duration of the

disability must be submitted. Such evidence will consist of:

(a) A statement by an attending physician, reporting diagnosis and treatment, the period(s) of disability, and the physician's prior and current evaluation of the feasibility of employment or training for the claimant. The statement should also indicate the date(s) when, in the opinion of the physician, training was first medically feasible.

(b) Other supporting evidence, such as hospital reports or results of laboratory tests.

(c) If, after full development, the claimant is unable to furnish medical

evidence of a disability, the claim will be disallowed with referral to the rating board.

e. Determinations. A favorable decision to extend a claimant's delimiting date under this provision requires the finding of the existence of a physical or mental disability which precluded training, establishment of the duration of such a disability, and a finding of the absence of willful misconduct on the part of the claimant for incurrence of the disability.

(1) Rating Decisions. Judging the existence of a physical or mental disability will be the responsibility of a VA rating board and will include establishment of the beginning and ending dates for the period or periods during which training was precluded by disability. These decisions will be

presented in a memorandum rating. (See M21-1, Ch. 47, par. 47.17.)

(a) Existence of a physical or mental disability which precluded training will be found if medical evidence clearly establishes a diagnosable disease, injury, or other defect judged to have made training medically infeasible.

(b) Notwithstanding medical evidence of a disability, medical infeasibility of training ordinarily may not be found for any period during which the claimant was employed full time. However, the rating board will ensure (1) that such employment was not part of a medically prescribed rehabilitation program; or (2) did not otherwise indicate an inability

to pursue training effectively before finding that training was not precluded.

(2) Willful Misconduct. When necessary, determinations concerning willful misconduct will be made in accordance with M21-1, chapter 14, paragraph 14.04. If such a decision is within the jurisdiction of the rating board (cases involving disease, paragraph 14.04e(1)), the decision will be incorporated in the memorandum rating. Otherwise, a separate administrative decision prepared by the Authorization activity is required.

(3) Disabilities of Less Than 30 Days' Duration. A disability of less than 30 days' duration will not entitle a claimant to a delimiting date extension unless the claimant

shows exceptional circumstances which prevented him or her from enrolling or reenrolling in the chosen program of education, or the claimant was forced to discontinue attendance because of the short disability. A statement from the claimant citing the specific circumstances (for example, registration or examination dates with which the disability interfered) will be accepted in the absence of contradictory information.

(a) If. after the rating board was determined the inclusive dates when training was not medically feasible, the evidence of record does not warrant a finding that the brief period of disability

prevented enrollment or reenrollment, the claim will be disallowed.

(b) A dictated letter of disallowance will inform the claimant of the period during which the VA has determined training was not medically feasible. The letter will explain why the evidence does not establish acceptable exceptional circumstances which would have prevented enrollment or reenrollment during the period of disability.

(c) If the claimant later submits additional evidence of exceptional circumstances, eligibility to an extension of delimiting date will be reconsidered.

* * * *

f. Length of Period of Disability. The length of the period of disability will be determined by an adjudicator as follows:

(1) Beginning Date. The beginning of the period will be the first day of the claimant's 10-year delimiting period or the first day on which the claimant's disability rendered training medically infeasible (as determined by the rating board), whichever is later.

(2) Ending Date. The ending of the period will be the earliest of the following dates:

(a) The date of the first ordinary term (summer sessions are excluded) following the date on which training became medically feasible.

* * * *

(b) The date on which the claimant enrolled or reenrolled after the period of disability if such date precedes the date specified in subparagraph (a) above.

(c) The claimant's basic delimiting date. NOTE: The length of any extension granted on account of disability will not provide any individual with more than ten years of eligibility during which training was medically feasible.

g. Chosen Program of Education. The claimant may select any approved program of education during an extended delimiting period, provided that the program selected would have been available to the claimant during his or her basic period of eligibility at the time disability prevent training.

* * * *

h. Determining Beginning and Ending Dates.

(1) Beginning Date. The claimant will elect the effective (beginning) date of the extended delimiting period:

(a) This elected date may be as early as the claimant's basic delimiting date or as late as the first day of the first ordinary term (excluding summer session) at the claimant's school which begins 90 days or more after VA approval of the delimiting date extension.

(b) An explanation of this election, including a statement of the date which appears most advantageous to the claimant (if this can be determined), will be included

in the notification of approval sent to the claimant.

(c) The claimant will also be informed that this election, once it has been made, is irrevocable.

(2) Ending Date. The ending date of the extended period will be established by adding the length of the period of disability determined under subparagraph f above to the beginning date of the extended period. The day after this ending date becomes the claimant's new delimiting date for educational benefit purposes. Once an extended delimiting date has been granted, it will not be extended further because of either recurrence of disability or the onset of a new disability when such recurrence or onset is

after the claimant's basic delimiting date. Although benefit payments may be made up to the new delimiting date, payments will not be continued beyond the limits of the veteran's entitlement, but see paragraph 5.03 regarding allowable extensions of entitlement.

i. Notification to the Claimant.

(1) Disallowances. The claimant will be informed of a disallowance of an application for extended delimiting date by dictated letter giving the specific reason for disallowance and enclosing full statement of appellate and procedural rights.

(2) Approvals. If the application for an extended delimiting date is approved, the claimant will be

notified at once by dictated letter. The following information will be included on the notification:

(a) The length of time the extended period will run, and a clear explanation of how this period was determined.

(b) An explanation of the possible beginning dates for the extended delimiting period as specified in subparagraph h(1) above and a request for the claimant's election of the beginning date. VA Form 21-4138 will be enclosed for the claimant's use. He or she must also be made aware that the election will be final after it is made and the extended delimiting period will run continuously from the chosen beginning date.

(c) The claimant will be informed of the approval or disapproval of the program of education for which he or she has applied. If no program has been indicated by the claimant, the claimant will be asked to furnish to statement which identifies his or her chosen program. The availability of VA counseling will also be explained.

(d) Notice of appeal and procedural rights will be enclosed.

14.04 WILLFUL MISCONDUCT AND VICIOUS HABITS DETERMINATIONS

a. General. Willful misconduct is basically the intentional doing of something either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.

(1) A determination will be made as to willful misconduct when a death or disability which affects entitlement was incurred under questionable circumstances.

(2) The principles stated in paragraph 14.03a regarding circumstances which do not warrant raising questions as

to line of duty are applicable to willful misconduct. (See VAR 1001(N).)

b. Proximate Cause. Injury may not be held due to willful misconduct on the basis of an act "malum in se" or "malum prohibitum" unless the wrongful act was in and of itself the proximate cause of the resulting injury.

c. Alcoholism. Basic principles for application in deciding cases involving alcoholism are stated Administrator's Decision No. 988, which classifies the injurious effects of drinking alcohol into two distinct groups.

(1) Proximate and Immediate Effects. A person will be held responsible for disabling injuries or death which resulted directly and immediately from indulgence in alcohol in an individual occasion. The willingness to achieve a drunken state and while in this condition to undertake tasks for which

unqualified physically and mentally by alcohol is willful misconduct.

(a) Determinations [of willful misconduct in such cases] will depend upon the facts found in the individual cases, but care should be exercised to guard against findings of willful misconduct on the basis of inconclusive evidence. [An adverse determination requires that] there must be excessive indulgence which was the <u>proximate cause</u> of the disability or death in question.

* * * *

(2) Organic Secondary Effects. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise are not to be considered of a willful misconduct origin. The development of the secondary condition does not meet the definition of intentional wrongdoing with knowledge or

wanton disregard of its probable consequences.

* * * *

e. Responsibility For Determinations

(1) Willful Misconduct. The rating board will determine the issue in cases involving disease or suicidal death (VAR 1301 and 1302). All other determinations are the responsibility of the Authorization unit.

(2) Vicious Habits. The meaning of "vicious habits" is stated in VAR 1301(B) and its application is limited to disability pension cases. The significance is usually medical in nature and when related to etiology of a disease the question is for consideration by the rating board.

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